NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 02-21-2012
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 10-0797
v.	DEPARTMENT D
MATTHEW ALEXANDER CRESPIN, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-105000-002SE

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Matthew Alexander Crespin appeals his conviction and sentence for transportation of marijuana for sale. For the following reasons, we affirm.

BACKGROUND

¶2 In January 2010, undercover police detectives conducted surveillance on an apartment in Mesa based on suspected drug activity. Crespin's girlfriend, M.R., lived at the apartment with her father. Crespin stayed at the apartment four to five nights a week. On January 26th, based on surveillance information, the detectives observed a vehicle Crespin had been driving enter a grocery store parking lot where Crespin and M.R. exited the vehicle, "[ran] around a little bit" without going into the store, and then got back into the vehicle and continued driving. The vehicle made another stop at Crespin's residence, then drove to a strip mall where Crespin spoke briefly with another male, and then stopped at a grocery store where Crespin bought some items. As the detectives continued to follow, they observed that the vehicle was speeding and its registration tag was not current. After receiving this information from the detectives, Officer Callender stopped the vehicle and observed Crespin reach under the passenger seat where he was seated. While speaking with Crespin, the officer noticed an odor of fresh marijuana coming from inside the vehicle. Relying on his narcotics-trained dog, Callender

located a backpack under Crespin's seat containing approximately one pound of marijuana.

¶3 Crespin and M.R. were transported to the police station where Detective Franklin read Crespin his *Miranda*[1] rights and questioned him. Crespin told Franklin that he was aware there was approximately a pound of marijuana in the vehicle and that a friend had "fronted" it to him to sell for $600, but that Crespin would not make any profit from it. The officers subsequently searched the apartment pursuant to a warrant and found evidence of a grow operation, including approximately three pounds of marijuana and drug paraphernalia.

¶4 In February 2010, Crespin was indicted on Count One, possession of marijuana for sale, a class 3 felony,[2] pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3405(A)(2) (Supp. 2011)[3] under a theory of accomplice liability for the marijuana found at the apartment, and Count Two, "sale or transportation" of marijuana, a class 3 felony, pursuant to A.R.S. § 13-3405(A)(4) for the marijuana found in the vehicle. Following a trial, a jury found Crespin not guilty on Count One and guilty

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Count One was initially listed as a class 2 felony, but was amended to conform to the evidence during trial.

[3] Absent any material change since the date of the offense, we cite the current version of a statute.

on Count Two. The court sentenced Crespin to a mitigated term of 3.5 years in prison. This timely appeal followed.

DISCUSSION

¶5 Crespin asserts that Count Two was duplicitous "because it charged multiple and separate crimes[:] sale or transportation for sale." An indictment is impermissibly duplicitous "if it charges two or more distinct and separate offenses in a single count." *State v. Klokic*, 219 Ariz. 241, 243, ¶ 10, 196 P.3d 844, 846 (App. 2008) (citation and internal quotation omitted). A duplicitous indictment "is forbidden because it does not provide adequate notice of the charge to be defended, . . . present[s] a hazard of a non-unanimous jury verdict, and . . . make[s] a precise pleading of prior jeopardy impossible in the event of a later prosecution." *State v. Davis*, 206 Ariz. 377, 389, ¶ 54, 79 P.3d 64, 76 (2003) (citations and internal quotations omitted). However, an "error potentially resulting from such an indictment may be cured when the basis for the jury's verdict is clear, when the state elects for the jury which act constitutes the crime, or when the trial court instructs the jury that it must agree unanimously on the specific act constituting the crime." *State v. Paredes-Solano*, 223 Ariz. 284, 290, ¶ 17, 222 P.3d 900, 906 (App. 2009).

¶6 Crespin argues the court erred in failing to sua sponte "direct the prosecutor to make an election" as to whether

it was seeking to prove a charge of sale *or* transportation for sale as to the marijuana found in the vehicle. But Crespin failed to raise a pretrial objection to the indictment on grounds of duplicity, so this issue is subject to review for fundamental error only. *Id.* at 288, ¶ 8, 222 P.3d at 904. To prevail under this standard, Crespin must establish both that fundamental error exists and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶7 Assuming without deciding that the indictment was duplicitous on its face, we conclude any potential error of a non-unanimous verdict was cured because the basis for the jury's verdict is clear and the State consistently informed the jury that it sought to convict Crespin on Count Two for "transportation of marijuana for sale." *See Paredes-Solano*, 223 Ariz. at 290, ¶ 17, 222 P.3d at 906. The State did not present evidence or allege that Crespin actually sold marijuana, nor did it make any such request to the jury. Instead, the prosecutor characterized Count Two in his opening statement as "transportation of marijuana for sale" and stated that the evidence supporting this charge "revolves around the traffic stop of the car, [and] the one pound [of marijuana] in it." He added that at the end of the case the State would ask for two verdicts: "Guilty for the possession of marijuana of over four

pounds, and also guilty for transporting the one pound in the vehicle." The State emphasized this point during its questioning of Detective Franklin:

> Q. And no sales took place; correct?
> A. No, no sales took place.
> Q. But did the defendant ever indicate that he planned on making a sale?
> A. Yes, he did.
> Q. Did he ever indicate that, specifically, the marijuana in the car, he planned on selling that?
> A. Yes, he did.

¶8 During closing arguments, the prosecutor provided additional direction to the jury: "For [Count Two], we do ask you to hold the defendant responsible, to find him guilty of *transportation of marijuana for sale*, what's underneath his seat, what's in that car, what he is exercising control over, what he knows to be under his seat . . . ." (Emphasis added.) Defense counsel's argument was similarly focused on the marijuana in the vehicle. Essentially his only defense to Count Two was based on the State's failure to prove who had actually placed the backpack containing the marijuana into the vehicle.

¶9 We therefore reject Crespin's contention that the basis for the jury's verdict under Count Two is unclear or that the State failed to make an election as to whether it was pursuing a conviction based on a "sale" of marijuana or a "transportation" of the marijuana for sale. *See State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App. 1993)

(finding there was no duplicity when "the state clearly delineated during closing arguments what specific conduct constituted the offense charged in each specific count"); *State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990) (finding error cured where clear from verdict that jury accepted victim's version of events over defendant's). Moreover, although Crespin vaguely asserts that the allegedly duplicitous indictment "failed to notify [him] of what evidence would be presented against him, and handicapped his defense," he does not specifically establish how the error he alleges caused him prejudice. *See Paredes-Solano*, 223 Ariz. at 290, ¶ 17, 222 P.3d at 906 ("That an indictment is duplicitous does not, by itself, require reversal; a defendant must prove actual prejudice.").

¶10 Alternatively, Crespin asserts that the *charge* under Count Two was duplicitous.[4] "When the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge, our supreme court has sometimes referred to this problem in shorthand as a duplicitous charge rather than a duplicitous indictment." *Klokic*, 219 Ariz.

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[4] This argument is also subject only to fundamental error review because Crespin failed to argue in the trial court that the evidence the State presented made the charge in Count Two duplicitous. *See Klokic*, 219 Ariz. at 244, ¶ 13, 196 P.3d at 847 (finding that defendant preserved issue of duplicitous charge for appeal by raising it after the evidence had been presented); *see also Paredes-Solano*, 223 Ariz. at 287, ¶ 6, 222 P.3d at 903.

at 244, ¶ 12, 196 P.3d at 847. Thus, Crespin argues "[t]he evidence at trial . . . presented multiple instances when the [S]tate asserted that [he] sold . . . the marijuana stowed under the passenger seat of the car and transported the same marijuana." Crespin asserts that the State sought to prove these "multiple discrete criminal acts" of selling marijuana through the detectives' testimony that Crespin made several stops with the marijuana in the car before being pulled over by police. We disagree.

¶11 As discussed *supra* ¶¶ 7-8, the State did not present evidence that Crespin sold the marijuana found in the car. As to Count Two, the State sought only to prove Crespin transported marijuana in the vehicle with the intent to sell it at some later time. The State's theory of the case as to Count Two was supported by the marijuana found in the backpack, the location of the backpack under Crespin's seat, his actions in attempting to reach under his seat while talking to Officer Callender, and Crespin's statements to the officers admitting he had been "fronted" the marijuana for the purpose of selling it for $600. No reasonable juror could have concluded that the State had presented evidence that Crespin "sold" the marijuana found under his seat. Moreover, Crespin fails to assert how this alleged error caused him prejudice. Accordingly, we find no reversible error.

CONCLUSION

¶12 For the foregoing reasons, we affirm Crespin's conviction and sentence.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

JON W. THOMPSON, Judge